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Federal Communications Commission
Office of Secretary

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)
)
Revision of Part 22 and Part 90 of the)
Commission's Rules to Facilitate Future)
Development of Paging Systems)
)
Implementation of Section 309(j) of the)
Communications Act -- Competitive Bidding)

WT Docket No. 96-18

PP Docket No. 93-253

To: The Commission

PETITION FOR RECONSIDERATION

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SUMMARY

Priority Communications, Inc. ("Priority") requests reconsideration of the Commission's final action in the Second Report and Order and Further Notice of Proposed Rulemaking ("Second R&O"), 62 Fed. Reg. 11616 (published March 12, 1997), to the extent that "geographic overlay" paging licenses would be (i) superimposed on the same frequencies and in the same areas where licensed paging service is already being provided to the public, and (ii) opened for competitive bidding. Existing systems already occupy almost all of the spectrum to be auctioned.

The Commission's auction authority under Section 307(j) is restricted to resolving mutual exclusivity between applications for initial non-broadcast licenses. The Second R&O does not adopt a proposal to resolve mutual exclusivity between presently pending paging applications, but rather, directs the wholesale dismissal of all pending mutually exclusive paging applications without consideration of their merits, after which incumbent licensees and new entrants alike will be invited to apply for market-based licenses that will overlay the existing paging systems already operating on the involved frequencies in those areas. The Commission's plan exceeds its authority under Section 307(j)(6)(E) of the Communications Act, which prohibits the Commission from artificially producing mutual exclusivity for the purpose of conducting auctions, and conflicts with the ultimate goal of Section 309(j), to rapidly deploy new technologies, products and services without administrative or judicial delays.

The Commission has shown no benefit to be gained by the proposal to auction geographic overlay licenses, other than anticipated revenue to be raised at auction. Section

309(j)(7) expressly prohibits the Commission from auctioning spectrum for the sole purpose of raising revenue.

The Commission's IRFA fails to address the significant economic impact of geographic overlay licensing on small businesses that are incumbent paging licensees. The record reflects that the superimposition of geographic overlay licenses on the same frequencies in the same areas where licensed paging systems presently operate will work substantial hardship on incumbent licensees.

In sum, the Commission's plan to auction geographic overlay paging licenses contravenes Section 307(j) of the Communications Act and Section 603 of the Regulatory Flexibility Act, and therefore should be reconsidered.

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To: The Commission

PETITION FOR RECONSIDERATION

Priority Communications, Inc. ("Priority"), by its attorney and pursuant to Section 1.429(a) of the Commission's Rules, hereby petitions for reconsideration of the Commission's final action in the Second Report and Order and Further Notice of Proposed Rulemaking ("Second R&O"), 62 Fed. Reg. 11616 (published March 12, 1997), to the extent that "geographic overlay" paging licenses would be (i) superimposed on the same frequencies and in the same areas where licensed paging service is already being provided to the public, and (ii) opened for competitive bidding^{1/}.

In support hereof, the following is respectfully shown:

A. Background.

This consolidated rule making proceeding was initiated by the Commission's Notice of Proposed Rulemaking ("NPRM"), 11 FCC Rcd 3108 (1996), which proposed, inter alia, to replace site-by-site licensing of paging systems with market-by-market licensing, and to adopt competitive bidding rules to resolve mutual exclusivity between paging applications.

^{1/}Priority filed Comments in this proceeding on March 18, 1996.

In the NPRM, the Commission acknowledged the substantial service that paging licensees presently provide to the public. Citing Communications Daily (June 30, 1995), a report by the investment firm Salomon Brothers², and the Commission's own 1995 Annual Report and Analysis of Competitive Market Conditions With Respect To Commercial Mobile Radio Services ("CMRS")³, the Commission observed that, at the time, there were more than 600 licensed paging operators, serving a total subscribership exceeding 27.3 million, with evidence of continued dramatic growth. NPRM at ¶¶6-7.

The Commission further acknowledged that incumbent paging licensees already heavily encumber the paging spectrum, leaving little unoccupied spectrum in which a new entrant could operate. (NPRM at ¶¶13-14, 22, 65). To illustrate, the Commission observed that in the Chicago paging market, only two of the thirty-seven 931 MHz band paging channels remain unlicensed, with more pending applications than channels remaining. The Commission found roughly equivalent scarcity in the New York, Philadelphia, Baltimore and Washington, D.C. paging markets. NPRM at ¶14.

The Commission noted that current licensing activity on certain paging bands is confined largely to "the addition of fill-in sites and minor expansion by existing licensees," which the Commission suggested indicates that "there is relatively little desirable spectrum that remains available for licensing on these channels." NPRM at ¶13.

²The Wireless Telecommunications Review (Spring 1994) at 20-21.

³First Report, 10 FCC Rcd 8844, 8854-55, 8863-68 (1995).

The Commission thus requested comment on the likely effect of the proposed conversion from site-by-site licensing to geographic-area licensing on incumbent licensees. NPRM at ¶¶23, 37, 67.

Eighty-three comments were received, many from incumbent licensees who confirmed that the paging spectrum is already densely packed, with little or no usable "white space" available for application by new entrants^{4/}. Commentors emphasized the dynamic nature of the industry, which has been expanding to cover wider areas and to implement improved technologies such as FLEX in response to market demands^{5/}. It was urged that the most effective and efficient way to transition to geographic licensing without disrupting existing paging service would be a mechanism that would build on, and not bridle, existing paging systems^{6/}.

The Second R&O announces that all non-nationwide exclusive-channel paging spectrum will be converted from site-by-site licensing to geographic licensing. Specifically, paging spectrum will be licensed pursuant to the Rand McNally Major Trading Areas ("MTAs") in the 929-931 MHz bands, and by Economic Areas ("EAs") in other paging bands. However, the licensed incumbent paging systems presently serving these areas on these frequencies will not automatically convert to geographic area licenses, or be afforded the

^{4/}See e.g. Priority Communications, Inc. at 10; Ameritech Mobile Services, Inc. at 10; Paging Coalition at 2.

^{5/}See e.g. Ameritech Mobile Services, Inc. at 5, 8; Paging Coalition at 3.

^{6/}See e.g. Priority Communications, Inc. at 4; Ameritech Mobile Services, Inc. at 16-18.

primary opportunity to fill-out the coverage of their home MTAs or EAs^{7/}. Nor will the availability of geographic overlay licenses be limited to unserved frequencies and areas^{8/}. Rather, the Commission has announced a complex scheme to superimpose "geographic overlay" licenses on the same frequencies and in the same areas where incumbent licensees are presently serving the public, and to subject mutually exclusive geographic overlay applications to competitive bidding.

The geographic overlay plan will necessitate the most mammoth spectrum auction to date. The Commission anticipates that a total of 16,630 non-nationwide geographic area licenses will be auctioned to overlay the existing licensed systems that currently serve the public (Second R&O, Appendix C at p.3).

As existing systems already occupy almost all of the spectrum to be auctioned, the geographic overlay licenses will be granted subject to a requirement to protect the incumbent systems operating on the same frequencies in the same areas. The incumbent systems are to be permitted to continue operation within their current composite interference contours, but will be barred from modifications which would expand current contours absent agreement with the geographic overlay licensee.

^{7/}Compare e.g. Rules For Rural Cellular Service, 4 FCC Rcd 5377, 5379-80 (1989) (cellular licensees accorded a five-year period to fill in coverage within their market areas free from competing applications).

^{8/}Compare e.g. Filing And Processing Cellular Applications For Unserved Areas, 6 FCC Rcd 6185 (1991) (procedures adopted for filing cellular applications for areas remaining unserved at the end of the incumbent licensees' five-year fill-in period).

All pending mutually exclusive applications for paging facilities, many of which have awaited administrative action for years, and many of which, as noted, seek only fill-in sites or minor expansions for existing systems, will be dismissed without consideration of their merits.

B. The Commission Is Statutorily Prohibited From Artificially Producing Mutual Exclusivity For The Purpose Of Conducting Auctions.

The Commission's auction authority derives from Section 307(j) of the Communications Act, which allows the Commission to resolve "mutual exclusivity" between applications for "initial" non-broadcast licenses by competitive bidding. In CMRS paging, where systems frequently are comprised of numerous simultaneously-triggered co-channel transmitters over extensive areas, an application is considered to be "initial" if it proposes use of a new frequency, or establishment of a new co-channel facility more than 2 kilometers from an existing transmitter in the existing co-channel system. Rule Section 22.541(c)(2)(iii). Applications are "mutually exclusive" if grant of one application would effectively preclude grant of another. Rule Section 22.131.

The Commission's records reflect that it currently has numerous mutually exclusive paging applications pending before it. However, the Second R&O does not adopt an auction mechanism to resolve these existing mutual exclusivities. Rather, the Second R&O directs the wholesale dismissal of all pending mutually exclusive paging applications without consideration of their merits. Second R&O at ¶6.

The plain language of the Act appears to indicate that once the Commission dismisses all presently pending mutually exclusive paging applications, there will no longer be a proper

basis to conduct an auction of paging spectrum. However, the Second R&O proposes a mechanism to artificially spawn new mutual exclusivities. Incumbent licensees and new entrants alike will be invited to apply for MTA- and EA-based licenses that will overlay the existing paging systems operating on the involved frequencies in those MTAs and EAs. Although the Commission speculates that geographic-area applicants might avoid applying for areas already substantially served by an incumbent (NPRM at ¶45), mutual exclusivity is a distinct, if not inevitable, possibility. Indeed, as bidders may elect to apply for "all" markets on their FCC Form 175 (Second R&O at 126), it is likely that there will be mutual exclusivity with respect to all 16,630 geographic overlay licenses that the Commission anticipates will be available for auction.

The Communications Act expressly prohibits the Commission from artificially producing mutual exclusivities for the purpose of conducting auctions. Section 309(j)(6)(E) of the Communications Act affirmatively obligates the Commission to take measures other than auction to avoid mutual exclusivities. Specifically, Section 309(j)(6)(E) directs the Commission to:

continue to use engineering solutions, negotiation, threshold qualifications, service regulations, and other means in order to avoid mutual exclusivity in application and licensing proceedings

Thus, Section 307(j)(6)(E) furthers the ultimate goal of Section 309(j), to rapidly deploy new technologies, products, and services without administrative or judicial delays. The Commission's plan to fabricate new mutual exclusivity in the paging spectrum for the sake of conducting auctions cannot be reconciled with Section 307(j)(6)(E).

The Commission's expectation that "open eligibility for paging licenses will result in a more competitive auction... ." does not justify overriding Section 307(j)(6)(E) to conduct auctions of geographic licenses to overlay the existing paging systems. The ultimate benefit to paging subscribers will derive not from imposing a "competitive auction," but rather from the expedition of service improvements in the highly-competitive paging industry that exists today.

The Commentors suggested various approaches to implement geographic licenses consistent with Section 307(j)(6)(E). For example, Priority and others suggested automatic issuance of geographic area licenses to incumbents already providing substantial service in their markets. Second R&O at ¶44. Through such a mechanism, any benefits of conversion to geographic licensing can be achieved without disrupting or stunting the paging service that is currently enjoyed by the public. Indeed, as the Commission has recognized the prevalence of existing wide-area paging systems (see e.g. Second R&O at ¶¶14-17), it would appear that automatic conversion of incumbent site-by-site licenses to MTA- or EA-based licenses would facilitate the most efficient and expeditious transition to a geographic licensing system, by avoiding the unwieldiness of geographic overlay licenses and the expense and unnecessary administrative delay of an extremely complex overlay auction.

C. The Commission Is Statutorily Prohibited From Auctioning Spectrum For The Sole Purpose Of Raising Revenue.

The record in this proceeding and the Commission's own database reflect that paging service is already widely available, and paging spectrum has already been heavily licensed based on determinations of the public interest, convenience and necessity. MTAs and EAs

are completely or nearly completely blanketed by usable signals from existing systems on virtually all paging frequencies. As functioning wide-area paging systems already significantly serve the public, it is unclear what public interest purpose might warrant superimposing geographic overlay licenses over the existing systems.

The Commission states that the geographic overlay scheme will provide flexibility for licensees; ease administrative burdens; facilitate further build-out of wide-area systems; and promote regulatory symmetry with narrowband PCS. Second R&O at ¶15. These goals, however laudable, do not justify disrupting a highly-developed industry that already effectively provides communications service to the public. Nor has geographic overlay licensing been shown as necessary or even appropriate to achieve the Commission's stated goals.

Geographic overlay licensing is not the appropriate solution to increase licensee flexibility. Incumbents who do not obtain geographic overlay licenses will actually be locked within their present contours, with less flexibility than at present to replace lost perimeter sites or to respond to customer needs. Although incumbents will not have to apply on a site-by-site basis for, or notify the Commission of, additional or modified facilities wholly encompassed within the existing system's contours, such flexibility is already provided under present Sections 22.163 and 22.165 of the Rules^{9/}.

^{9/}Rule Section 22.163(a) allows CMRS licensees to modify existing systems without prior Commission approval or notification where no extension of the system's existing service and interfering contours would result. Rule Section 22.165 allows CMRS licensees to add co-channel transmitters at additional locations without prior Commission approval or notification where no extension of the system's existing service and interfering contours would result.

The geographic overlay licensees that are confined to slivers of leftover spectrum between incumbent systems will not have flexibility either. The Second R&O subjects the overlay systems to rigid requirements to protect incumbents from interference. Under such circumstances, fundamental engineering principals will severely curtail or preclude interference-free overlay operation^{10/}.

Geographic overlay licensing will not necessarily result in an easing of administrative burdens. Processing requirements have already been substantially reduced by Rule Sections 22.163 and 22.165, which spare licensees from submitting (and the agency from processing) filings requesting or reporting additional or modified facilities within the previously authorized contours of existing systems.

On the other hand, geographic overlay licensing will require an enormous allocation of agency resources to marshal the largest spectrum auction ever conducted.

After auction, the agency will find itself called upon to police interference disputes between incumbent systems and the geographic systems overlaying them.

Geographic overlaying will not necessarily facilitate further build-out of existing wide-area systems. Rather, as noted above, incumbents who do not become the geographic overlay licensees will actually be blocked from further build-out of their existing systems, absent the geographic overlay licensee's consent.

^{10/} Although the Commission urges due diligence by potential applicants (Second R&O at 2), there is a real danger that speculators and unsophisticated investors may misunderstand the government's offering of these licenses as a guarantee that the overlay licensee will be able to use the spectrum to provide paging service.

Regulatory symmetry between paging and PCS sounds appealing, but would be wholly inappropriate. Paging is a mature industry, with much of the paging spectrum already licensed and placed in service. Narrowband PCS is being introduced on a new allotment of virgin spectrum. In view of the substantial presence of incumbent systems in the paging spectrum, the most efficient and effective approach for converting paging to geographic licensing would be to build upon the substantial paging systems that are already in operation^{11/}.

The Commission has not expressed any anticipated benefit that present paging subscribers will enjoy as a result of conversion to geographic overlay licensing.

Based on the foregoing, it would appear that the only discernable reason for disrupting the existing paging industry and inviting applications for geographic overlay licenses is to draw revenues into the federal coffers through auctions.

Section 309(j)(7) of the Communications Act declares it unlawful for the Commission to auction already substantially utilized paging spectrum solely to raise revenue. In pertinent part, Section 309(j)(7) states:

309(j) USE OF COMPETITIVE BIDDING --

(7) CONSIDERATION OF REVENUES IN PUBLIC
INTEREST DETERMINATIONS. --

^{11/}Although the Commission previously auctioned 900 MHz SMR licenses subject to a requirement to provide interference protection to incumbent systems, Channels in the 896-901 MHz and 935-940 MHz Bands Allotted to the Specialized Mobile Radio Pool, 10 FCC Rcd 6884, 6901, aff'd, 11 FCC Rcd 2639, 2653 (1995), it is indisputable that the 900 MHz SMR spectrum was not as fully developed as the paging spectrum already is.

(A) CONSIDERATION PROHIBITED. -

- In making a decision ... to assign a band of frequencies to a use for which licenses or permits will be issued [through use of competitive bidding] ... the Commission may not base a finding of public interest, convenience, and necessity on the expectation of Federal revenues from the use of a system of competitive bidding

(B) CONSIDERATION LIMITED. -- In prescribing regulations [for competitive bidding] ... the Commission may not base a finding of public interest, convenience, and necessity solely or predominantly on the expectation of Federal revenues from the use of a system of competitive bidding under this subsection.

The Commission has demonstrated no benefit whatsoever, other than anticipated financial benefit to be derived from spectrum auctions, for superimposing geographic overlay licenses where incumbent systems already serve the public. There is thus no basis upon which the Commission's plan to auction geographic overlay licenses can be sustained.

D. The Commission's IRFA Fails To Address The Significant Economic Impact of Geographic Overlay Licensing On The Operations Of Small Businesses That Are Incumbent Paging Licensees.

Small businesses that are incumbent paging licensees will be severely impacted economically by the Commission's proposal to superimpose geographic overlay licenses over presently licensed paging systems. At Appendix C to the Second R&O, the Commission appended an Initial Regulatory Flexibility Analysis ("IRFA") which purports to address the impact of the conversion to geographic licensing on small entities^{12/}. The Commission concluded that "nearly all" incumbent licensees are "small businesses" as defined by the Small

^{12/}Appendix D is an IRFA which analyzes the further proposed rule changes.

Business Administration ("SBA")^{13/}. However, the Commission's IRFA addresses only the impact of its Second R&O on prospective geographic licensees, and gives no attention to the impact of geographic licensing on incumbents who are not the high bidders for the geographic licenses that will be superimposed over their existing systems.

Bidding credits and installment payment plans have been adopted to ease the economic impact of paying off spectrum bids, but no steps have been taken to minimize the economic burdens that will be imposed on incumbent licensees that are small businesses faced with competing for the geographic licenses that will be offered at auction to overlay their existing systems.

Indeed, the record reflects that the superimposition of geographic overlay licenses will work substantial hardship on incumbent licensees. Incumbents will be obliged to deposit substantial advance upfront payments to preserve auction eligibility for their home MTAs and EAs, thus diverting funds from present operations. At auction, market rivals may attempt to artificially inflate the cost of their competitors' spectrum by outrageously bidding up that spectrum. Incumbent licensees that do not obtain geographic overlay licenses will be frozen within their current contours.

The IFRA does not address why a geographic overlay scheme would be less burdensome on incumbent licensees who are small businesses than other alternatives proposed by Commentors, such as allowing incumbents to trade-in their current site-by-site licenses for licenses covering their MTAs or EAs. Second R&O at 44.

^{13/}13 C.F.R. §121.201 Standard Industrial Classification (SIC) Code 4812.

As the Commission has failed to address why it believes a geographic overlay plan will impact small business less than such alternatives, the IRFA fails to pass muster.


E. Conclusion.

The Commission's plan to superimpose and auction geographic overlay paging licenses on the same frequencies and in the same areas where licensed paging service is already being provided to the public contravenes Section 307(j) of the Communications Act and Section 603 of the Regulatory Flexibility Act, and therefore cannot be sustained.

WHEREFORE, the premises considered, Priority Communications, Inc., respectfully requests the Commission to grant reconsideration as set forth herein.

Respectfully submitted,

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